IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12491 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYESH ALIAS JAGO MANJIBHAI DABHI

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 12491 of 2002

MR SATISH R PATEL for Petitioner No. 1

MS HARSHA DEVANI AGP for Respondent No. 1-3

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 23/05/2003

ORAL JUDGEMENT

#. The petitioner detenu has by filing this petition, challenged the order of detention passed by the

Commissioner of Police, Ahmedabad City dated 25.11.2002, wherein, the Detaining Authority had while considering the material placed before him, recorded satisfaction that the petitioner detenu is indulging into prejudicial activities to the maintenance of public order and accordingly, the Detaining Authority from the material placed before him, confirmed that the petitioner detenu is a "dangerous person" within the meaning of Section 2 (c) of the Gujarat Prevention of Anti-social Activities Act, 1985 (hereinafter referred to as "PASA Act" for short). The petitioner has challenged the impugned order on various grounds by praying that the order of detention be declared illegal and same be quashed and set aside as the order of detention is passed without any application of mind. While filing this petition, the petitioner has annexed various documents consisting of order of detention dated 25.11.2002, committal order issued on the same day by the Detaining Authority detaining the petitioner detenu with Rajkot Jail and the grounds of detention dated 25.11.2002 with the documents, which were relied upon by the Detaining Authority at the time of passing the order of detention against the petitioner and representation made by advocate Shri Patel dated 10.12.2002 addressed to the Hon'ble Home Minister, Gujarat State in respect of the order of detention passed against the petitioner detenu.

#. As per order dated 27th December, 2002, the court had issued Rule, which was made returnable on 27.1.2003. In reply to the petition, the Detaining Authority has filed affidavit-in-reply denying the averments and allegations made by the petitioner and supported the order passed by him by highlighting that from the material placed before him, he was satisfied that the petitioner is indulging into prejudicial activities to the maintenance of public order and with a view to prevent such prejudicial activities, it was necessary for him to detain the petitioner under the provisions of PASA Act.

#. When the matter was notified for final hearing before me, an application being Civil Application No. 3414 of 2003 was presented praying for amendment in the petition and the said application was granted by me on 20.5.2003. Accordingly, the petitioner has amended the petition as per amendment sought for by him, which was granted by this court.

#. Mr. Patel, learned advocate for the petitioner has while arguing the matter has taken me through the petition and documents attached thereto namely the grounds of detention and other material relied upon by

the Detaining Authority while passing the order of detention against the petitioner dated 25.11.2002. Mr. Patel has raised several contentions in the petition and prayed for setting aside the order of detention including the contention that the order of detention is passed at a belated stage considering the last offence registered against the detenu, which was relied upon by the Detaining Authority i.e. on 8th September, 2002 and the Detaining Authority had passed order on 25th November, 2002, after more than about 2 months. However, though he has taken several contentions while praying for setting aside the order of detention, he has placed in service only one contention to the effect that the Detaining Authority has considered two statements of witnesses recorded by the police and verified by the Detaining Authority himself and in that statements, the witnesses have highlighted about the unregistered offences, which has taken place at the instance of the petitioner and his associates. While considering these statements, the Detaining Authority had claimed privilege under Section 9 (2) of the PASA Act. It is the contention that the Detaining Authority has not made any inquiry whether such incidents as referred to by the witnesses have in fact occurred or not and no contemporaneous record has been kept and considered by the Detaining Authority and in absence of such material, the privileged claimed by the Detaining Authority is indicated non application of mind, arbitrariness and malafide and therefore, continues detention of the detenu become illegal.

#. The detail affidavit-in-reply is filed by the Detaining Authority denying the averments and allegations made by the petitioner in the petition. The Detaining Authority in par 6 has stated that he had carefully scrutinised, examined and considered all the materials and papers placed before him. He has also considered statements of witnesses of unregistered offence recorded by the police and he himself has verified and after verification of the genuineness and correctness of the statements regarding unregistered offences, he has accepted and believed the facts narrated by the witnesses to be genuine and he reached to the conclusion to detain the detenu by resorting to the provisions of PASA Act and the order of detention was passed, only with a view to prevent such prejudicial activities.

#. Ms. Harsha Devani, learned AGP has supported the order of detention and it is her contention that after considering the material placed before the Detaining Authority and after two statements of the witnesses have been recorded by the police highlighting about the

incidents, which the witnesses have faced at the instance of the petitioner and his associates, came to the conclusion that the said fact affect the public order and after verifying the statements and recording satisfaction, the Detaining Authority has passed the order of detention. Ms. Devani has also taken me through the statements of witnesses as well as affidavit-in-reply filed by the Detaining Authority and according to her, no ground is made out to set aside the order of detention passed by the Detaining Authority.

#. Mr. Patel, learned advocate for the petitioner has in support of his argument about the privilege claimed by the Detaining Authority under Section 9 (2) of the PASA Act, placed reliance upon the decision of this court in case of Mohmad Sarif @ Kalio Nurmohmadsarnibapu Shaikh Vs. Commissioner of Police, Ahmedabad and ors. reported in 1997 (1) G.L.H. p.1017. While placing the said decision in support of his submission, it is the contention of Mr. Patel that even as found from the affidavit-in-reply filed by the Detaining Authority in support of order of detention, there is nothing to suggest that any other contemporaneous document was with the Detaining Authority and merely the Detaining Authority had accepted the say of the witnesses in respect of the incidents, which they have narrated, for which the public order was disturbed. In the said decision, the Court in para 5 observed as under :-

> "..... no other contemporaneous evidence on the basis of which the Detaining Authority could form the opinion with reference to any contemporaneous evidence relating to the date of respective incidents so as to form the opinion that petitioner - detenu was a dangerous person and that he should be subjected to the detention under the provisions of Gujarat Prevention of Anti-social Activities Act...."

Applying the ratio of the said case, though in the present case, the Detaining Authority has filed affidavit, which I have already discussed earlier, there is nothing to indicate that any contemporaneous material was with Detaining Authority and the Detaining Authority has merely on verification of the statement, has accepted the say of the witnesses, in respect of which the incident has occurred at the instance of the petitioner and his associates and on that day public order was disturbed. Here in the present case, there is no explanation in affidavit of the Detaining Authority

regarding breach of public order and merely by reproduction of such statements in the body of the order cannot be said to be sufficient so as to show the active application of mind by the Detaining Authority at the time of passing of the order, more particularly when there is no contemporaneous evidence with the Detaining Authority, the privileged claimed by the Detaining Authority shows non application of mind and this court is of the view that order of detention passed by the Detaining Authority deserves to be set aside only on this ground alone and detenu is ordered to be set free. No other point is canvassed.

#. As discussed hereinabove, petition is allowed. The impugned order dated 25.11.2002 passed by the Commissioner of Police, Ahmedabad City is quashed and set aside. The detenu Shri Jayesh @ Jago Manjibhai Dabhi is ordered to be released forthwith, if not required in any other case. Rule is made absolute accordingly. Direct Service Permitted.

(D.K. Trivedi, J.)
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